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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 815

COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES, *Petitioner,*

v.

VICTORY TRANSPORT INCORPORATED, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONER'S REPLY BRIEF

Respondent's Brief in Opposition reflects both the confusion surrounding the decision below and the substantiality of the questions presented in the Petition. To dispel that confusion, this Reply Brief is filed.

1. The Inapplicability of the Sovereign Immunity Doctrine to the Jurisdictional Questions in Issue

The basic misconception underlying the decision below—and repeated in this Court by the respondent (Opp., p. 4)—is that the unavailability to the Comisaria General of the sovereign immunity defense is decisive of the jurisdictional questions raised in the Petition. If the Comisaria General is not entitled to sovereign immunity with respect to the subject matter of this case, says the respondent (Opp., p. 4), then it "must occupy the same position in challenging the extraterritorial service herein that any other foreign business concern which has voyage-chartered a vessel and agreed to arbitration in New York, would occupy." References are then made to the State Department's Tate Letter and its rejection of the so-called absolute theory of sovereign immunity to support the denial of immunity in this case.

But the concept of sovereign immunity, whether in its absolute or restrictive sense, has no bearing whatever on the problem of how a court acquires jurisdiction *in personam* over a foreign sovereign entity. As the Department of Justice has pointed out in its brief before the Court of Appeals for the District of Columbia Circuit in *Hellenic Lines Limited* v. *Moore,* No. 18,265, pending for decision:[1]

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[1] The *Hellenic Lines* case grew out of a shipping contract between the appellant corporation and the Republic of Tunisia; appellant claimed a breach of contract and damages in the amount of $13,175. Appellant then filed on the admiralty side of the District Court for the District of Columbia a libel *in personam* against the Republic and requested that summons be served on the Republic through its Ambassador in the District of Columbia. The United States Marshal refused to serve the summons and the District Court granted the Government's motion to dismiss the attempt to compel such service.

"The policy considerations outlined in the so-called 'Tate Letter' apply only to situations where a court has already acquired jurisdiction over a foreign sovereign under the rules of the forum and where the question is whether continued retention of jurisdiction by the court will frustrate the foreign policy of the United States or interfere with the conduct of foreign relations by the Executive arm of the Government. It is implicit in the State Department's policy declaration that where no suggestion of immunity is presented by the Executive, a court's retention of jurisdiction will not interfere with the Executive's conduct of foreign relations. The Executive's silence, however, is not to be taken as a declaration that the court has jurisdiction. Even absent a suggestion of immunity presented by the Executive, it is incumbent upon the court to examine whether the case presents a justiciable controversy, *whether a foreign sovereign is properly before the court;* and whether the controversy is such as to be cognizable in a municipal forum under local law." Brief, p. 19.

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"The Tate-Letter did not purport to emasculate, and could not emasculate, diplomatic privileges and immunities. *The Tate-Letter did not purport to change, and could not change, the law of the United States as to how personal jurisdiction can be obtained over a nonresident foreign sovereign entity, nor did the Letter in any way attempt to change the requirements of the Federal Rules of Civil Procedure regarding service.*" Brief, p. 20. [Emphasis added.]

In other words, even if it be assumed that the shipping transaction here involved was of a commercial nature so as to preclude a defense of sovereign immunity under the principles of the Tate Letter, no an-

swer would be supplied to the questions whether (1) the sovereign Comisaria General can be said to have consented to *in personam* jurisdiction by agreeing beforehand to the generalized arbitration clause, and (2) service on this foreign sovereign entity was properly effected under the Federal Rules. Those are questions to be resolved by the judiciary without regard to any theory of sovereign immunity.

2. The Critical Importance of the Sovereign Status of the Petitioner to the Resolution of the Jurisdictional Questions

The critical and uncontested fact in this case is that the Comisaria General is a branch of a foreign sovereign. That sovereign status remains a fact even it be assumed that the defense of a sovereign immunity as to the subject matter of the controversy is not available. And because the Comisaria General is a foreign entity the two questions posed in the Petition are substantial and warrant full review and resolution by this Court.

Respondent misconceives the nature of the first question set forth in the Petition and the conflict between the decision below and the English decisions. Simply stated, the question is whether a foreign sovereign entity can be said to have consented, solely by virtue of having signed a generalized arbitration clause, to the subsequent assertion of *in personam* jurisdiction by a particular federal court. As to that question, several considerations must be kept in mind:

(1) To quote Bankes, L. J., in *Compania Mercantil Argentina* v. *United States Shipping Board*, [1924] All Eng. Law Rep. 186, 187:[2]

[2] See also *Oster* v. *Dominion of Canada*, 144 F. Supp. 746, 749 (N.D.N.Y.), quoted at p. 14 of the Petition.

> ". . . the question as to whether the vessel was or was not employed in private trading [thereby bringing the sovereign immunity doctrine into issue] really does not arise in a case such as this where proceedings are taken *in personam,* and it is established to the satisfaction of the court that the body against whom the proceedings are taken is a body representing a sovereign state."

(2) The clear conflict between the decision below and the cited English cases is thus unrelated to any "absolute" or "restrictive" theory of sovereign immunity, as respondent would have it (opp., p. 4). Rather, the conflict concerns the propriety of reading a general arbitration clause as a consent *by a sovereign* to the subsequent assertion of *in personam* jurisdiction. The English courts take the position that a sovereign's consent must be tested as of the time a suit is instituted, and not prior thereto, and that the consent must be explicit and directed to the court. The court below, however, has held that the sovereign's consent may be implied from the general language of an arbitration clause agreed to long before the institution of court action—a position expressly rejected by the English courts with respect to such arbitration clauses. Thus the conflict is clear and irreconcilable.

It becomes important, therefore, for this Court to determine if uniformity is desirable with reference to the assertion under these circumstances of *in personam* jurisdiction over foreign sovereigns. The English courts, as was the court below, were dealing with general arbitration clauses that govern disputes arising under international shipping contracts. As sovereign entities engage more and more in shipping transactions from one country to another and as they tend more and more to utilize standardized charter party agree-

ments containing general arbitration clauses, it becomes of critical importance both to American courts and to foreign sovereigns to know the extent, if any, of the consent to *in personam* jurisdiction to be read into the arbitration clause. Should there be uniformity with the English approach to this problem, or should some other jurisdictional guidelines be fashioned for American tribunals? The absence of any definitive answer in the annals of this Court—or of any other American court—makes the choice an open one.

(3) The analogy drawn by the court below and by the respondent between a foreign sovereign entity engaged in a commercial transaction and an ordinary foreign corporation engaged in a similar transaction is both faulty and irrelevant. The analogy assumes that the supposed unavailability of the sovereign immunity defense to the merits somehow drains the sovereign of its sovereign status for jurisdictional purposes in the first instance. The impropriety of that assumption is plain. A sovereign remains a sovereign whatever the ultimate judicial view as to a claim of immunity. And because of that sovereign status, the question remains as to how and under what circumstancess it may be said to have consented to the initial assertion of *in personam* jurisdiction. To say that the sovereign is like a foreign corporation not only infuses the question with sovereign immunity irrelevancies but assumes the very point in issue—can a sovereign entity be treated like a foreign corporation for purposes of *in personam* jurisdiction?

Moreover, this confusion between sovereign entities and foreign corporations pervades the treatment by the court below and by respondent of the second question set forth in the Petition, the question as to the pro-

priety of substituted service on a foreign sovereign entity under Rule 4 of the Federal Civil Rules.

Once again it must be noted that the commercial or governmental nature of the sovereign's activities has nothing whatever to do with the sovereign nature of the entity. And because the entity is sovereign and because proper service of process is necessary under any view of this case, the question must be faced as to whether any provision of Rule 4 authorizes any form of service on such a foreign sovereign, particularly by registered mail addressed to the sovereign at its capital city.

Respondent's reliance (Opp., pp. 5-6) upon the New York state law of service—borrowed by Rule 4(d)(7) as to the foreign corporations mentioned in Rule 4(d)(3)—affords no answer to this problem. Nothing in Rule 4 or in the New York Civil Practice Act even pretends to discuss service upon foreign sovereign entities. The only references relied upon by the court below and by respondent are to service upon foreign corporations.[3] In short, the Federal Rules permit service in accordance with appropriate state law *only* as to an "individual" or a "domestic or foreign corporation" or a "partnership or other unincorporated association which is subject to suit under a common name." Rules 4(d)(1) and 4(d)(3), as incorporated in Rule 4(d)(7).

The statement of the court below that there is no reason under international law for giving special treatment to foreign sovereigns in the service of proc-

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[3] See, e.g., *Gilbert* v. *Burnstine*, 255 N.Y. 348; *Prosperity Company, Inc.* v. *American Laundry Machinery Co.*, 297 N.Y. 486; *Farr & Co.* v. *Cia Internacional de Navegacion*, 243 F. 2d 342 (C.A. 2); *Orion S & T Co.* v. *Eastern States Petro. Corp.*, 284 F. 2d 419 (C.A. 2).

ess (Pet. App. 18a) simply ignores the plain fact that there is no provision in Rule 4—and nothing in the New York law for Rule 4 to borrow—permitting or contemplating any form of service on a foreign sovereign.[4] And the Department of Justice's recognition (see Petition, pp. 27-28) that the draftsman of the Federal Rules just did not contemplate any form of service in suits against foreign governments poses the critical question here whether the "legal vacuum in this area" of the Rules can be filled by use of an analogy to foreign corporations.

Far from this being the narrow and parochial matter suggested by respondent (Opp., p. 5), the issue is one of major concern in the administration of the Federal Rules with respect to foreign sovereigns. The multiplicity of the efforts being made to utilize the Federal Rules to effect personal service upon foreign sovereign entities and their agents[5] makes appropriate a definitive resolution of the problem by this Court.

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[4] Respondent's assertion (Opp., pp. 6-7) that the court in *Berlanti Construction Co.* v. *Republic of Cuba*, 190 F. Supp. 126 (S.D.N.Y.), regarded Cuba as a "domestic or foreign corporation" or "partnership or other unincorporated association" for purposes of Rule 4(d)(3) is misplaced. The court there ruled only that a federal court could not obtain *in personam* jurisdiction over Cuba through personal service on the Minister of the Presidency of the Republic of Cuba in Havanna, Cuba, pursuant to a court clerk's order "permitting" such service by some one other than a federal marshal. The court said that such service was not permitted under either the Federal Rules or the New York law.

[5] See, in addition to the efforts made in the instant case and in its companion case, *Petrol Shipping Corp.* v. *Kingdom of Greece*, 326 F. 2d 117, 332 F. 2d 370 (C.A. 2) (Pet., p. 22), the efforts in *Hellenic Lines Limited* v. *Moore*, No. 18,265 (App. D.C.); *Oster* v. *Dominion of Canada*, 144 F. Supp. 746 (N.D.N.Y.); and *Berlanti Construction Co.* v. *Republic of Cuba*, 190 F. Supp. 126 (S.D.N.Y.). Only in the instant case has the effort been finally sustained.

CONCLUSION

For these reasons, supplementing those set forth in the Petition, certiorari should issue to review the judgment below.

Respectfully submitted,

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